ESTHER DORAISAMY v. VIJAYAN GOPAL

HIGH COURT MALAYA, SHAH ALAM
SM KOMATHY SUPPIAH J
[PETITION NO: BA-33-386-07-2020]
11 MAY 2022

Abstract – *Section 106(1) of the Law Reform (Marriage and Divorce) Act 1976 provides that no divorce petition could be filed unless the conciliatory body has certified that it has failed to reconcile the married parties subject to the exceptions outlined in the provisos. There is nothing in the provisos to s. 106(1) that state that litigants need to refer their matrimonial difficulty to the conciliatory body only once.*

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out petition for divorce – Petitioner obtained certificate of non-conciliation in 2002 from conciliatory body – Petitioner filed petition for divorce in 2020, utilising 2002 certificate – Whether 2002 certificate could still be used – Whether fresh certificate of non-conciliation from conciliatory body ought to be secured – Whether petition defective, null and void – Whether ought to be struck out – Law Reform (Marriage and Divorce) Act 1976, s. 106(1) – Rules of Court 2012, O. 18 r. 19(1)(b), (c) & (d)*

FAMILY LAW: *Divorce – Petition – Petitioner obtained certificate of non-conciliation in 2002 from conciliatory body – Petitioner filed petition for divorce in 2020, utilising 2002 certificate – Whether 2002 certificate could still be used – Whether fresh certificate of non-conciliation from conciliatory body ought to be secured – Law Reform (Marriage and Divorce) Act 1976, s. 106(1)*

The petitioner wife and the respondent husband were married in 1984. In 2010, the petitioner filed a unilateral petition for divorce at the High Court after obtaining a certificate of non-conciliation dated 28 August 2002 ('2002 certificate'). However, as the parties decided to reconcile, the said petition was withdrawn and struck out with liberty to file afresh ('liberty clause'). In 2020, the petitioner filed a petition for divorce, utilising the 2002 certificate. The respondent filed the present application to strike out the petition, pursuant to O. 18 r. 19(1)(b), (c) and (d) of the Rules of Court 2012 ('ROC') and r. 103 of the Divorce and Matrimonial Proceedings Rules 1980, on the grounds that: (i) the 2002 certificate could no longer be used as the parties had reconciled and lived together for a period of ten years after the first petition was withdrawn; (ii) the filing of the present petition, without first securing a fresh certificate of non-conciliation from the conciliatory body, as required by s. 106(1) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'), rendered it defective, null and void; and (iii) if indeed the petitioner

had thought that the marriage had no chance of reconciliation and going back to the conciliatory body would be an exercise in futility, she ought to have applied for a dispensation order from the court to dispense with the reference of the marital difficulty to see the conciliatory body for a second time.

Held (allowing application):

(1) This was a plain and obvious case where the summary procedure, provided under O. 18 r. 19 of the ROC should be invoked to strike out a petition filed in contravention of s. 106(1) of the LRA. (para 23)

(2) The liberty clause (i) merely enabled the parties to file a second petition for divorce in the event they were unable to work out their differences; and (ii) could not allow the parties to rely on the 2002 certificate if reconciliation failed. In light of the fact that the parties had reconciled and lived together for a period of ten years after the first petition was withdrawn, there was no valid basis for the petitioner to contend that the 2002 certificate was still valid. (para 16)

(3) The wording in s. 106(1) of the LRA is clear and unambiguous. No petition could be filed unless the conciliatory body has certified that it has failed to reconcile the parties subject to the exceptions outlined in the provisos. There is nothing in the provisos to s. 106(1) of the LRA that states that litigants need to refer their matrimonial difficulty to the conciliatory body only once. The liberty clause did not enable the petitioner to file the petition without a fresh certificate of non-conciliation from the conciliatory body's fresh certificate, as mandated by s. 106(1) of the LRA. (paras 16-18)

(4) Section 106(1) of the LRA (i) requires an application for a dispensation order to precede the filing of the petition for divorce; and (ii) makes prior reference to a conciliatory body and the issuance of a certificate of non-conciliation mandatory for the filing of a petition for divorce unless an applicant obtains an order from the court to dispense with this requirement. To allow a petitioner to seek dispensation after the petition has been filed would encourage parties to stop going to the conciliatory body and render the prohibition in s. 106(1) of the LRA ineffectual. (para 20)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v.United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

C v. A [1998] 4 CLJ 38 HC ***(refd)***

Jeyasakthy Kumaranayagam v. Kandiah Chandrakumaran [1996] 3 CLJ 272 HC ***(refd)***

Peh Chin Ping v. Gan Ho Soon [2021] 1 LNS 1554 HC ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Robert Stevenson Kay v. Stephanie Tan Min Chiu & Anor [2020] 1 LNS 1005 HC ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, r. 103
Law Reform (Marriage and Divorce) Act 1976, s. 106(1)
Rules of Court 2012, O. 18 r. 19(1)(b), (c), (d)

For the petitioner - Patrick Samuel Joseph Sebastian; M/s The Law Offfice of Patrick Samuel
For the respondent - Bharathi Krishnan, M/s Kamarudin Yusof & Assocs

Reported by Najib Tamby

JUDGMENT

SM Komathy Suppiah J:

The Application

[1] This is an application by the respondent to strike out a petition for divorce on the ground that it was filed in contravention of s. 106 of the Law Reform (Marriage and Divorce) Act 1976 ("LRMDA"). The application is made pursuant to O. 18 r. 19(1)(b), (c) and (d) of the Rules of Court 2012 ("ROC") and r. 103 of the Divorce and Matrimonial Proceedings Rules 1980.

[2] The petitioner strenuously objects to the application. For the purpose of these proceedings, the respondent and petitioner have filed three affidavits each.

Background

[3] The petitioner and respondent were married on 18 August 1984 and have two children who are now in their thirties. Sometime in 2010, the petitioner wife filed a unilateral petition for divorce at the Kuala Lumpur High Court after obtaining a certificate of non-conciliation dated 28 August 2002 from the conciliatory body that it has failed to reconcile the parties ("the 2002 certificate"). However, on 2 March 2011, the petition was withdrawn and struck out with liberty to file afresh ("the liberty clause") as the parties had decided to reconcile.

[4] The parties sometime in 2019 prepared and executed a joint petition for divorce, but the same was not filed. Following that, in July 2020, the petitioner filed the instant petition at the Shah Alam High Court utilising the 2002 certificate.

[5] This has prompted the respondent to apply to strike out the petition on the ground it was filed without a valid certificate of non-conciliation.

A **Parties' Submissions**

[6] The respondent contends the 2002 certificate can no longer be used as the parties had reconciled and lived together for a period of ten years after the first petition was withdrawn. He submits that the filing of the present petition for divorce without first securing a fresh certificate of
B non-conciliation from the conciliatory body as required by s. 106(1) of the LRMDA renders it defective, null and void.

[7] The respondent also contends that if indeed the petitioner had thought that the marriage had no chance of reconciliation, and going back to the conciliatory body would be an exercise in futility, she ought to have applied
C for a dispensation order from the court to dispense with reference of the marital difficulty to the conciliatory body for a second time. The respondent cites the decision of the High Court in *Peh Chin Ping v. Gan Ho Soon* [2021] 1 LNS 1554; [2021] MLJU 2001 in support of this submission.

D **[8]** In responding to the respondent's submissions, the petitioner contends that as the first petition was struck out with liberty to file afresh, this demonstrates that the court has given the petitioner leave to refile the petition at any time using the 2002 certificate. She submits that there is no necessity to obtain a fresh certificate from the conciliatory body as the liberty clause
E allows her to use the 2002 certificate instead of applying for a new one.

[9] The petitioner next contends that the conduct of the parties in appointing a lawyer to prepare and the subsequent execution of the joint petition shows that the parties accept that there is no chance of reconciliation. She says that as such it is unreasonable for the respondent to take the position
F that she ought to have applied for a fresh non-conciliation certificate from the conciliatory body.

[10] The petitioner further contends that the petition should not be struck out as the issue pertaining to the alleged non-compliance with the requirement in s. 106(1) of the LRMDA is a triable issue and cannot be
G determined by affidavit evidence.

[11] The petitioner submits, in the alternative, that if the court takes the view that the 2002 certificate has lapsed, the court has the power to permit her to make an oral application for a dispensation order at this stage under proviso (vi) of s. 106 on the basis that there are exceptional circumstances
H which make reference to a conciliatory body impracticable. In support of this proposition, the petitioner relies on the High Court decisions in *C v. A* [1998] 4 CLJ 38; [1998] 6 MLJ 222 and *Robert Stevenson Kay v. Stephanie Tan Min Chiu & Anor* [2020] 1 LNS 1005; [2020] MLJU 1123. In these cases, it was held that a petitioner can seek for dispensation during the hearing of the
I divorce petition itself.

Section 106

[12] In view of the rival positions taken by the parties, it becomes necessary to set out s. 106(1):

> Requirement of reference to conciliatory body before petition for divorce
>
> (1) No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:
>
> Provided that this requirement shall not apply in any case:
>
> (i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;
>
> (ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;
>
> (iii) where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend;
>
> (iv) where the respondent is imprisoned for a term of five years or more;
>
> (v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or
>
> (vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.

The Law On Striking Out

[13] As noted earlier, the application to strike out the petition for non compliance with s. 106 is made pursuant to O. 18 r. 19(1) ROC. Order 18 r. 19(1) of the ROC provides, *inter alia*, that the court may at any stage of the proceedings order to be struck out any pleading on the grounds that:

(i) it discloses no reasonable cause of action or defence; or

(ii) it is scandalous, frivolous or vexatious; or

(iii) it may prejudice, embarrass or delay the fair trial of the action; or

(iv) it is an abuse of the process of the court.

[14] There are copious authorities that have held that a court deciding a striking out application must consider whether the action is "plainly and obviously unsustainable" or whether there are other reasons relating to the abuse of process and impossibility of a fair trial that justify striking out the

A action. See *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 (SC) and *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16 (SC).

[15] With these principles in mind, I turn to the arguments of the parties.

B

Whether The 2002 Certificate Can Be Used

[16] The petitioner's case that the 2002 certificate is still valid is premised on the liberty clause. In my judgment, the liberty clause merely enables the parties to file a second petition for divorce in the event they were unable to
C work out their differences. I am unable to accept the petitioner's submission that the liberty clause also allows the parties to rely on the same 2002 certificate if reconciliation failed. In light of the fact that the parties had reconciled and lived together for a period of ten years after the first petition was withdrawn, there is no valid basis for the petitioner to contend that the
D 2002 certificate is still valid.

[17] In my view, the wording in s. 106(1) of the LRMDA is clear and unambiguous. No petition can be filed unless the conciliatory body has certified that it has failed to reconcile the parties subject to the exceptions outlined in the provisos. There is nothing in the provisos to s. 106(1) that
E states that litigants need to refer their matrimonial difficulty to the conciliatory body only once.

[18] I find that the liberty clause does not enable the petitioner here to file the petition without a without a fresh certificate of non-conciliation from the conciliatory body fresh certificate as mandated by s. 106(1) of the LRMDA.
F I therefore reject the petitioner's submission on this point.

Whether Permissible To Make Oral Application To Dispense With Requirement In Section 106(1)

[19] That brings me to the respondent's alternative point that the court has
G the power, even after filing of the petition, to allow the petitioner to seek an order to dispense with the requirement for reference to a conciliatory body.

[20] As noted earlier, there are conflicting High Court decisions on this issue. Having examined these cases, I am inclined to agree with the view expressed in *Peh Chin Ping v. Gan Ho Soon* (*supra)* [7] that s. 106(1) of the
H LRMDA requires an application for a dispensation order to precede the filing of the petition for divorce. In my view, s. 106(1) makes prior reference to a conciliatory body and the issuance of a certificate of non-conciliation mandatory for the filing of a petition for divorce unless an applicant obtains an order from the court to dispense with this requirement. In my view, to
I allow a petitioner to seek dispensation after the petition has been filed would encourage parties to stop going to the conciliatory body and render the prohibition in s. 106(1) ineffectual.

[21] I must also briefly deal with the petitioner's submission on the joint petition. She takes the position the fact that parties had initially intended to proceed by way of joint petition, demonstrates that it would be an exercise in futility to go back to the conciliatory body. I am unable to accept this submission. The respondent was entitled and within his right to revoke his consent to the joint petition at any time. See *Jeyasakthy Kumaranayagam v. Kandiah Chandrakumaran* [1996] 3 CLJ 272; [1996] 5 MLJ 612.

[22] It would follow that upon the respondent withdrawing his consent, the petitioner was left with two options. She could have either referred the matrimonial difficulty to the conciliatory body again or applied for a dispensation order before filing the instant petition.

Conclusion

[23] In my view this is a plain and obvious case where the summary procedure provided under O. 18 r. 19 of the ROC should be invoked to strike out a petition filed in contravention of s. 106(1) of the LRMDA. Accordingly, I allow the respondent's application with costs of RM2,000.